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The Laws of War and NATO Attacks on Yugoslavia

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I Introduction

In May 2000 the Serbian Public Prosecutor, Dragisa Krsmanic, began the indictment of the leaders of the USA, the UK, France and Germany, and former NATO Secretary-General Javier Solana, for war crimes. These charges, laid in the Serbian Supreme Court, relate to alleged violations by NATO forces of the Geneva Convention on the conduct of war. These violations were alleged to have occurred in the course of NATO attacks upon Serbia, intended to persuade the Yugoslav Government to comply with United Nations Security Council Resolutions 1160, 1199 and 1203, which required its withdrawal from the province of Kosovo. From 24 March to 8 June 1999 NATO was alleged to have breached the Convention by using cluster bombs, and by attacking civilians, residential areas, and non-military targets.

Ironically, Yugoslav President Slobodan Milosevic and four other Yugoslav Serbs have been indicted by the Chief Prosecutor of the International Criminal Tribunal for the former Yugoslavia, also for alleged war crimes. In this case it is against the Kosovo Albanians.

The situation is one fraught with dangers and difficulties for the international community. As with the trial of Libyan suspects in the Lockerbie case, the development of rules and procedures of international criminal trials have been influenced more by political considerations than by legal. But we can say with confidence that an international criminal legal system is developing.

Public international law regulates relations between nations. That part which relates to military action is generally known as the Law of Armed Conflict, or anciently as the Laws of War. War is both a state of "armed, physical contest between nations", and "a legal condition of armed hostility between states".[1]

The instigation and conduct of war has since the very earliest times been subject to some degree of regulation or control. In the thirteenth century Thomas Aquinas wrote, "[I]n order that a war may be just three things are necessary. In the first place, the authority of the prince, by whose order the war is undertaken ..."[2] His second and third requirements for a just war, like those of his predecessor St Augustine, bishop of Hippo, were a just cause and right intent. Were such the only requirements for the use of force to be lawful, the NATO bombing campaign in the former Yugoslavia in early 1999, intended to achieve peace in Kosovo, would appear lawful. But the laws of war have advanced much since St Thomas lived, and ironically, the United Nations Charter, designed to promote peace, enshrines a growing tendency to prohibit all wars not waged in self-defence.[3] This left little room for the "just war", a concept which has reared its head increasingly.[4]

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[1]Hugo Grotius, De Jure Belli ac Pacis (1625).

[2]St Thomas Aquinas, *Summa theologica*, Secunda secundae, Quaestio XL (de bello), quoted in John Eppstein, The Catholic Tradition of the Law of Nations 83 (1935).

[3]Y. Dinstein, War, Aggression and Self-Defence (2nd ed 1994); M.S. McDougal & F. Feliciano, The International Law of War (1994); L. Damrosck & D.J. Scheffer (eds), Law and Force in the New International Order (1991); A. Cassese, Violence and Law in the Modern Age (1988); J. Murphy, The United Nations and the Control of International Violence (1982); Julius Stone, Conflict through consensus (1977); Frederick H. Rusell, The Just War in the Middle Ages (1975); R.A. Falk, Legal Order in a Violent World (1968); Ian Brownlie,

The basic sources of the law of armed conflict are written and unwritten rules, treaties, agreements, and customary law.[5] A treaty is an agreement between entities, both or all of which are subjects of international law possessed of international personality and treaty-making capacity. All sovereign states enjoy the right to make treaties. Some self-governing colonies, protectorates, and international organisations have the capacity to enter into agreements, though their right to do so is usually limited.

Custom is general state practice accepted as law. The elements of custom are a generalised repetition of similar acts by competent state authorities and a sentiment that such acts are juridically necessary to maintain and develop international relations. The existence of custom, unlike treaty-law, depends upon general agreement, not unanimous agreement.[6]

The legality of any given action by the international community, or by an individual country or group of countries depends upon whether the action is justified by international law. The NATO air strikes on the former Yugoslavia early in 1999 were designed to force compliance with United Nations resolutions, but were not expressly authorised by the United Nations.[7] Nor did they resemble traditional peacekeeping missions, or defensive military actions, such as the British action for the recovery of the Falkland Islands from Argentine

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International Law and Use of Force by States (1963); M.S. McDougal & F. Feliciano, Law and Minimum World Public Order (1961); D.W. Bowett, Self-Defence in International Law (1958); Julius Stone, Legal Controls of International Conflict (2nd ed 1959); Julius Stone, Aggression and World Order (1958); H. Waldock, *The Regulation of the Use of Force by Individual States in International Law*, 81 Hague Academy of International Law Recueil des Cours 415. See, for instance, Vitoria in the sixteenth century; Francisco de Vitoria, *De Indis et de Jure Belli Relectiones* ss 14, 29, 60, 203 trans in Anthony Pagden & Jeremy Lawrance (eds), *Vitoria: Political Writings* (1991) and cited in S. Bailey, Prohibitions and Restraints in War (1972) 11.

[4]The evolution may be traced in T.M. Franck, Fairness in International Law and Institutions (1995) ch 8; Geoffrey Best, War and Law since 1945 (1994); L.C. Green, The Contemporary Law of Armed Conflict (1993); C. Greenwood, *The Concept of War in Modern International Law*, 36 International and Comparative Law Quarterly 283 (1987); M. Walzer, Just and Unjust Wars (2nd ed 1977); S. Bailey, Prohibitions and Restraints in War (1972). The concept of the just war largely disappeared after the Peace of Westphalia; L. Gross, *The Peace of Westphalia, 1648-1948*, 42 American Journal of International Law 20 (1948).

[5]Maurice H. Keen, The Laws of War in the Late Middle Ages (1965). International law has been called "the sum of the rules or usages which civilized states have agreed shall be binding upon them in their dealings with one another"; West Rand Central Gold Mining Co. v. The King [1905] 2 KB 391 quoting Lord Russell of Killowen in his address at Saratoga in 1876. Standard histories of the laws of war include Adam Roberts & Richard Guellf (eds.), Laws of War (1982) and Geoffrey Best, Humanity in Warfare: The Modern History of the International Law of Armed Conflict (1980).

[6]G. Glahn, Law Among Nations: An Introduction to Public International Law (1992).

[7]During the bombing there was a conspicuous absence of legal argument in defence of the action from NATO itself. Member countries relied on whatever justification they preferred; Ove Bring, *Should NATO take the lead in formulating a doctrine on humanitarian intervention*, 3 NATO Review 24 (1999).

invaders in 1982. That is not to say, however, that NATO acted unlawfully in bombing Yugoslavia. But what was the legal basis for its action?[8]

II The scope of the Laws of War

Traditionally the laws of war were concerned with the regulation of warfare,[9] usually, though not exclusively, state warfare.[10] Additionally, since the nineteenth century there has been significant growth in the laws of humanity, or human rights.[11] It has been said that these two strands have joined.[12] There has been much concentration on humanitarian law, and

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[8]See Anthony Arend & Robert Beck, International Law and the Use of Force: beyond the UN Charter paradigm (1993); James Gow, Triumph of the lack of will: international diplomacy and the Yugoslav war (1997).

[9]Gretchen Kewley, International Law in Armed Conflicts (1984).

[10]Heather Wilson, International Law and the Use of Force by National Liberation Movements (1988). Laws were allowed, in the view of St Thomas Aquinas in the thirteenth century, if it was by sovereign authority, accompanied by a just cause, and supported by the right intention of the belligerents; St Thomas Aquinas, *Summa theologica*, Secunda secundae, Quaestio XL (de bello), quoted in John Eppstein, The Catholic Tradition of the Law of Nations 83 (1935); Von Elbe, *The Evolution of the Concept of the Just War in International Law*, 33 American Journal of International Law 669 (1939).

[11]Geoffrey Best, War and Law since 1945 (1994); L.C. Green, The Contemporary Law of Armed Conflict (1993); C. Swinarski (ed), Studies and Essays on International Humanitarian Law and Red Cross Principles (1984); M. Bothe, K. Partsch & W. Solf, New Rules for Victims of Armed Conflict (1982); J. Pictet, Humanitarian Law and the Protection of War Victims (1982); Geoffrey Best, Humanity in Warfare: The Modern History of the International Law of Armed Conflict (1980); A. Cassese (ed), The New Humanitarian Law of Armed Conflict (1979); F. Karlshoven, The Law of Warfare (1973); G. Draper, *The Geneva Convention of 1949*, 114 Hague Academy of International Law Recueil des Cours 59; G. Draper, *Implementation and Enforcement of the Geneva Conventions and of the Two Additional Protocols*, 164 Hague Academy of International Law Recueil des Cours 1. Consideration of human rights obligations have become central to planning military operations; Felicity Rogers, *Australia's Human Rights Obligations and ADF Operations*, 131 Australian Defence Force Journal 41-44 (1988).

[12]Lt-Col Frank Thorogood, rtd, *War Crimes: How Do We Define Them and Punish the Criminals?*, 119 Australian Defence Force Journal 4-16 (1996).

especially the punishment of war criminals.[13] But the basic question of when it is lawful to start an offensive war has been largely ignored.[14]

For most purposes, the law of war may be divided into two parts: the legitimacy of the resort to force, and the rules governing the conduct of hostilities, often called *jus ad bellum* and *jus in bello* respectively. Both have changed markedly in the twentieth century.[15]

It is now generally recognised that the law of armed conflict applies in all international armed conflicts, regardless of their legality.[16] They have now been extended to the modern phenomenon known as wars of national liberation. These revolutions, are defined by Article 1 (4) of Protocol I additional to the Geneva Conventions for the Protection of War Victims, 1949, in 1977, as "armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination".[17]

There have long been efforts to codify the rules of war. One early modern attempt was by Francis Lieber, whose *Instructions for the Government of Armies of the United States in the Field*, was promulgated by President Abraham Lincoln in 1863.[18] But articles of war,

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[13]Lt-Col Frank Thorogood, rtd, *War Crimes: How Do We Define Them and Punish the Criminals?*, 119 Australian Defence Force Journal 4-16 (1996); Gerry Simpson, *Nuremberg Revisited? The United Nations War Crimes Tribunal for the Former Yugoslavia*, International Law News (February 1994). There is, however, no unified system of sanctions in international law; W.M. Reisman, *Sanctions and Enforcement*, in C. Black & R.A. Falk (eds), The Future of the International Legal Order (1971) 273; S. Schwebel (ed), The Effectiveness of International Decisions (1971); G. Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 Modern Law Review 1 (1956); J. Brierly, *Sanctions*, 17 Transactions of the Grotius Society 68 (1932).

[14]Chris af Jochnick & Roger Normand, *The Legitimation of Violence: a Critical History of the Laws of War*, 35 Harvard International Law Review 72 (1994). See J. Ilingham & J.C. Holt (eds), War and Government in the Middle Ages (1984).

[15]Ian Brownlie, International Law and the Use of Force by States (1963).

[16]This is expressed in Article 2, which is common to all four Geneva Conventions of 1949:

> [The Conventions apply to] all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

[17]Article 1 (4) of Protocol I additional to the Geneva Conventions for the Protection of War Victims, 1949 (1977):

> armed conflicts in which peoples are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination, as enshrined in the Charter of the United Nations and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations

[18]*Instructions for the Government of Armies of the United States in the Field* General Orders No. 100, reprinted in Dietrich Schindler & Jiri Toman (eds) The Laws of Armed Conflicts (1973).

governing the army in the field, had been issued since early times, and reached their culmination in England in the seventeenth century.[19]

The first major international attempt at codification was the Hague Peace Conference, 1899. At the conference a number of conventions on the rules and laws of war were reduced to writing. In 1907, another conference, at The Hague, revised the rules and made them more detailed. The resulting Law of The Hague recognised that the total avoidance of war should be their ultimate goal. But it recognised that war is sometimes unavoidable, and was to this extent a legitimate means of settling disputes between nations.[20]

The Kellogg-Briand Pact 1928 (Pact of Paris) essentially codified the customary laws of war. It was signed by 65 countries, including the USA, who all thereby renounced aggressive war as an instrument of national policy.[21]

In 1945 almost all nations signed the United Nations Charter, thereby promising to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the purposes of the United Nations".[22] Hence, aggressive war, as such, has been eliminated from among the lawful means of conducting international relations. Yet, the use of armed force has not ceased.

The use of armed force pursuant to a decision or recommendation of the United Nations (United Nations), in accordance with Article 42 of its Charter, is not "war" in the strict technical sense. In 1950-53 53 of the 59 members of the United Nations contributed in some way to the police action in Korea.[23]

III Background to the present troubles in the Balkans

The present troubles of Yugoslavia and the states, which before its collapse in 1991 comprised the old republic, is a consequence of its complex and often violent history. This has involved a complex mix of languages, races and religions, due to the location of the country, and the various invasions. Particularly important was the Turkish occupation of much of the country for several centuries until the end of the nineteenth and the early years of the twentieth century.[24]

Serbia historically comprised a Slavonic race of Orthodox religion. Montenegro also was populated by a Slavonic race adhering to Orthodoxy, as was Macedonia. Croatia and Slovenia were also Slavonic, but its peoples were Catholics, as the countries had been under Hungarian domination.[25]

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[19]Laws and Ordinances of Warre 1639, reprinted in Military Forces of the Crown ed Charles Clode (1869) vol 1 App VI.

[20]Preamble to the 1907 Hague Convention IV Respecting the Laws and Customs of War on Land.

[21]Lt-Col PM Boyd, *The Law of Armed Conflict; Definition, Sources, History*, 86 Australian Defence Force Journal 19, 24 (1991).

[22]Charter of the United Nations and Statutes of the International Court of Justice (1945).

[23]See Department of Public Information, Korea and the United Nations (1950).

[24]See Aleksander Pavkovi'c, The Fragmentation of Yugoslavia: nationalism in a mutlinational state (1997).

[25]Bogdan Denitch, Ethnic Nationalism: the tragic death of Yugoslavia (1996).

The people of Bosnia and Herzegovina were racially Serbian, but the Turks had forcibly converted the majority to Islam after the occupation began in 1463. Substantial numbers of Islamic Slavs were also found in the south of Serbia. In the province of Kosovo 90% of the population was Albanian. In the province of Vojvodina in the north there was a large Hungarian minority. The autonomy of both was ended 1990. Additionally, 20% of Macedonias population were Albanian.[26]

The Albanian Kosovars are Muslims, but, unlike the population of Bosnia and Herzegovina they are not Slavs. Kosovo was of great historic importance to Serbs being the site of a series of famous battles with the invading Turks. Thus, its importance is much greater to Serbia than its size or population would suggest.[27]

IV Offensive war

Could NATO attacks upon Yugoslavia be classified as an unjustified offensive war? This is an important question, for if so, if would then not merely be arguably *ultra vires* the North Atlantic Treaty,[28] but also contrary to the laws of war. The London Charter of 1945, establishing the International Military Tribunal, Nuremberg, contained the first definition of crimes against peace and of crimes against humanity.

Article 6 (a) defined crimes against peace as including waging a war of aggression.[29] Article 6 (b) defined war crimes as violations of the laws and customs of war.[30]

Principle VI of the International Law Commission in 1950 confirmed the criminality of the acts defined in Article 6 of the London Charter. But the Kellogg-Briand Pact 1928 had already made waging an aggressive war a crime.[31]

V The United Nations and the use of offensive war

The United Nations Charter Article 1 states that the purposes of the United nations are to maintain international peace and security through collective measures.[32]

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[26]See R. Hayden, *Imagined communities and real victims: self-determination and ethnic cleansing in Yugoslavia*, 23 (4) American Ethnologist 788 (1996); and A. Smith, *The Ethnic sources of Nationalism*, 35 (1) Survival 49 (1993).

[27]For Serbian history and its impact upon the dissolution of Yugoslavia see Tim Judah, The Serbs: history, myth, and the destruction of Yugoslavia (1997); S. Woodward, Balkan Tragedy: Chaos and dissolution after the Cold War (1995).

[28]Article 1 of which requires the alliance to act in conformity with the Charter of the United Nations, which allows offensive action which is consistent with the purposes of the United Nations Charter.

[29]"namely, planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a common plan or conspiracy for the accomplishment of any of the foregoing".

[30]"namely, violations of the laws or customs of war. Such violations shall include, but shall not be limited to, ... wanton destruction of cities, towns and villages, or devastation not justified by military necessity."

[31]Lt-Col PM Boyd, *The Law of Armed Conflict; Definition, Sources, History*, 86 Australian Defence Force Journal 19, 24 (1991).

[32]The Purposes of the United Nations are:

United Nations Charter Article 2 (in part) requires international disputes to be settled by peaceful means, and for states to refrain from the threat of use, or the actual use of, force.[33]

The General Assembly has power to discuss, consider, and recommend. The Security Council alone has power to act. Article 39 that the Security Council determines the existence of any threat to peace, and makes recommendations on the appropriate response.[34]

> 1. To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace;
>
> 2. To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace;
>
> 3. To achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion; and
>
> 4. To be a centre for harmonizing the actions of nations in the attainment of these common ends

– Charter of the United Nations and Statutes of the International Court of Justice Art 1 (1945).

[33]

> 3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
>
> 4. All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
>
> 5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
>
> 7. Nothing contained in the present Charter shall authorize the United Nations to interfere in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

– Charter of the United Nations and Statutes of the International Court of Justice Art 2 (1945).

[34]

> The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.

United Nations Charter Article 41 allows the Security Council to decide what additional non-military measures to take.[35] United Nations Charter Article 42 allows the Security Council to take military action if non-military action is inadequate.[36] United Nations Charter Article 51, critically, preserves the inherent right of collective or individual self-defence against attack, but subject to referring the matter to the Security Council.[37]

The threat or use of force may be used, in the last resort, as a means of enforcing international law. This can include intervention, reprisals, or war. But these types of police action may only occur where international law clearly allows it. Aggressive war is no longer a legitimate instrument of national policy, but nor is the use of force limited or reserved to the United Nations.

– Charter of the United Nations and Statutes of the International Court of Justice Art 39 (1945).

[35]

> The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations

– Charter of the United Nations and Statutes of the International Court of Justice Art 41 (1945).

[36]

> Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations.

– Charter of the United Nations and Statutes of the International Court of Justice Art 42 (1945).

[37]

> Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security. Measures taken by Members in the exercise of this right of self-defence shall be immediately reported to the Security Council and shall not in any way affect the authority and responsibility of the Security Council under the present Charter to take at any time such action as it deems necessary in order to maintain or restore international peace and security.

– Charter of the United Nations and Statutes of the International Court of Justice Art 51 (1945).

Many international lawyers would argue that current legal views of the United Nations Charter does not accommodate the bombing of the former Yugoslavia, since the action was neither based on a Security Council decision under Chapter VII,[38] nor pursued in collective self-defence under Article 51, the only two justifications for the use of force that are currently available under international law.[39]

VI The use of force without the approval of the United Nations

The exercise of independent action by NATO is not necessary contrary to the United Nations Charter. Article 52 (in part) states that regional security arrangements may exist.[40] These may be utilised by the Security Council.[41]

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[38] Articles 39-51, action with respect to threats to the peace, breaches of the peace, and acts of aggression.

[39] Ove Bring, *Should NATO take the lead in formulating a doctrine on humanitarian intervention*, 3 NATO Review 24, 25 (1999).

[40]

> 1. Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.
>
> 2. The Members of the United Nations entering into such arrangements or constituting such agencies shall make every effort to achieve pacific settlement of local disputes through such regional arrangements or by such regional agencies before referring them to the Security Council.
>
> 3. The Security Council shall encourage the development of pacific settlement of local disputes through such regional arrangements or by such regional agencies either on the initiative of the states concerned or by reference from the Security Council.

– Charter of the United Nations and Statutes of the International Court of Justice Art 52 (1945).

[41]

> 1. The Security Council shall, where appropriate, utilize such regional arrangements or agencies for enforcement action under its authority. But no enforcement action shall be taken under regional arrangements or by regional agencies without the authorization of the Security Council, with the exception of measures against any enemy state, as defined in paragraph 2 of this Article, provided for pursuant to Article 107 or in regional arrangements directed against renewal of aggressive policy on the part of any such state, until such time as the Organization may, on request of the Governments concerned, be charged with the responsibility for preventing further aggression by such a state.
>
> 2. The term enemy state as used in paragraph 1 of this Article applies to any state which during the Second World War has been any enemy of any signatory of the present Charter.

Article 54 provides that "the Security Council shall at all times be kept fully informed of activities undertaken or in contemplation under regional arrangements or by regional agencies for the maintenance of international peace and security."[42]

But NATO officials were reluctant do describe the organisation as a regional organisation, nor were its actions authorised or approved by the United Nations

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Yet Article 1 allows, or even requires that member nations "take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace".[43]

But police action is only allowed to suppress a breach of international law. What had Yugoslavia done? It had not invaded or threatened a neighbour. As the Secretary-General's statement to the press following the meeting of the North Atlantic Council on 27 October 1998 made clear, the air attacks on Yugoslavia were "in order to back up diplomatic efforts to achieve peace in Kosovo and open the way for a political solution to the crisis".[44]

VII Police action by NATO

In late March 1999 aircraft of the North Atlantic Treat Organisation (NATO) began bombing military and strategic targets in Serbia and Montenegro, the rump of Yugoslavia. This was intended to persuade the Yugoslav Government, headed by Slobodan Milosevic, to comply with United Nations Security Council Resolutions 1160, 1199 and 1203.[45] NATO is not itself an agency of the United Nations, but that did not mean that its actions were illegitimate.

The North Atlantic Treaty was signed at Washington, DC, on the 4th April 1949. It was modelled to some extent on the Rio Pact (the Inter-American Treaty of Reciprocal Assistance) of the 2nd September 1947. But the principle purpose of the North Atlantic Treaty Organisation is collective defence, rather than maintaining international peace and security.

The North Atlantic Treaty is the political framework for an international alliance designed to prevent aggression or to repel it, should it occur. The signatory countries state their desire to live in peace with all peoples and all governments. Reaffirming their faith in the principles of the United Nations, they undertake in particular to preserve peace and international security and to promote stability and well-being in the North Atlantic area.

– Charter of the United Nations and Statutes of the International Court of Justice Art 53 (1945).

[42]Charter of the United Nations and Statutes of the International Court of Justice Art 54 (1945).

[43]Charter of the United Nations and Statutes of the International Court of Justice Art 1 (1945).

[44]4 NATO Review 12 (Winter 1989).

[45]Official Records of the Security Council, 53rd year 1998.

To achieve these goals, they sign their names to a number of undertakings in different fields. They agree, for example, to settle international disputes by peaceful means, in order to avoid endangering international peace, security and justice. They also agree to refrain from the threat or use of force in any way that would not be consistent with the purpose of the United Nations. They undertake to eliminate conflict in their international economic policies and to encourage economic collaboration between their countries.

Under this Treaty, the member countries therefore adopt a policy of security based on the inherent right to individual and collective self-defence accorded by Article 51 of the United Nations Charter, while at the same time affirming the importance of co-operation between them in other spheres.[46]

The text of the Treaty consists of 14 Articles, and is preceded by a Preamble that emphasises that the Alliance has been created within the framework of the United Nations Charter and outlines its main purposes.

Article 1 defines the basic principles to be followed by member countries in conducting their international relations, in order to avoid endangering peace and world security.[47]

Article 2, inspired by Article 1 of the United Nations Charter, defines the aims which the member countries will pursue in their international relationships, particularly in the social and economic spheres, and their resulting obligations.

In Article 3, signatories state that they will maintain and develop their ability, both individually and collectively, to resist attack.

Article 4 envisages a threat to the territorial integrity, political independence or security of one of the member countries of the Alliance and provides for joint consultation whenever one of them believes that such a threat exists.

Article 5 is the core of the Treaty whereby member countries agree to treat an armed attack on any one of them, in Europe or Northern America, as an attack against all of them. It commits them to taking the necessary steps to help each other in the event of an armed attack.

Although it leaves each signatory free to take whatever action it considers appropriate, the Article states that, individually and collectively, the member nations must take steps to restore and maintain security. Joint action is justified by the inherent, individual and collective right of self-defence embodied in Article 51 of the United Nations Charter. But it is agreed that measures taken under the terms of the Article shall be terminated when the Security Council has acted as necessary to restore and maintain international peace and security.

Article 6 defines the area in which the provisions of Article 5 apply. However it does not imply that events occurring outside that area cannot be the subject of consultation within the Alliance. The preservation of peace and security in the North Atlantic Treaty area can be

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[46] *The North Atlantic Treaty* in The North Atlantic Treaty Organisation: Facts and Figures 376-8 (1989).

[47]

> The parties undertake, as set forth in the Charter of the United Nations, to settle any international disputes in which they may be involved by peaceful means in such a manner that international peace and security, and justice, are not endangered, and to refrain in their international relations from the threat or use of force in any manner inconsistent with the purposes of the United Nations.

– *The North Atlantic Treaty* in The North Atlantic Treaty Organisation: Facts and Figures 376-8 (1989).

affected by events elsewhere in the world, and the North Atlantic Council must therefore, as a matter of course, consider the overall international situation.

In Articles 7 and 8, member nations stipulate that none of their existing international commitments conflict with the terms of the Treaty and that they will not enter into any commitments in the future which do so. In particular, they state that rights and obligations pertaining to membership of the United Nations are unaffected by the Treaty, as is the primary role of the United Nations Security Council in the sphere of international peace and security.

Article 7 provides that the North Atlantic Treaty does not affect the rights and obligations imposed by the United Nations Charter.[48]

NATO was designed for defensive operations, but it is now being used, perhaps not offensively, but in an international policing role. This is a manifestation of what has been called the "New World Order".[49]

VIII NATO attacks on Yugoslavia

Why did NATO attack Yugoslavia?

The clearest official explanation of the initial circumstances is in the Secretary-General's statement to the press following the meeting of the North Atlantic Council on 27 October 1998. This recounted how NATO had issued an Activation Order (ACTORD) for limited air operations and a phased air campaign against Yugoslavia, in order to back up diplomatic efforts to achieve peace in Kosovo and open the way for a political solution to the crisis. This was designed to ensure a full and unconditional compliance by President Milosevic with United Nations Security Council Resolutions 1199 and 1203.[50]

The Statement on Kosovo issued at the Ministerial Meeting of the North Atlantic Council, Brussels, 8 December 1998, elaborated. NATO's aim had been to contribute to international efforts to stop the humanitarian crisis in Kosovo, end the violence there and bring about a lasting political settlement.[51]

IX Authority for NATO action in the Balkans

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> This Treaty does not affect, and shall not be interpreted as affecting, in any way the rights and obligations under the Charter of the Parties which are members of the United Nations, or the primary responsibility of the Security Council for the maintenance of international peace and security.

– *The North Atlantic Treaty* in The North Atlantic Treaty Organisation: Facts and Figures 376-8 (1989).

[49]Wg-Cdr Peter May, RAAF rtd, *International Legal Order: A Reality or Merely a Regulative Idea?*, 92 Australian Defence Force Journal 15-19 (1992).

[50]4 NATO Review 12 (Winter 1998).

[51]1 NATO Review 21 (Spring 1999).

The obligations of third parties in a civil war historically were to remain neutral, or to aid the government but not the rebels. But exceptions to the general rule have become so common that the exceptions seem to have become the rule.[52] Now the development of the international humanitarian law seems to allow police actions which hitherto were regarded as being of domestic concern only.[53]

The development of the idea that self-determination is a legal right has challenged the distinction between internal and international armed conflicts. It has extended the humanitarian law of war in its entirety to new realms, and it has eroded the prohibition of the use of force espoused in the Charter of the United Nations.[54]

Some lawyers would agree that a trend in the international community towards a better balance between the security of states, and the security of people is emerging. United Nations Secretary-General Kofi Annan, speaking to the Commission on Human Rights in Geneva, on 7 April 1999, at the height of the air campaign has also acknowledged this.[55]

If the action was not unlawful, it was either based on a new interpretation of the United Nations Charter in line with modern international law; an exceptional deviation from international law; or an attempted shift of international law to a new position where, in humanitarian crises, the sovereignty of states has to yield to the protection of peoples.[56]

Given the overwhelming direction of development in favour of outlawing war, it would be difficult to see it solely as being based on a new interpretation of the United Nations Charter in line with modern international law.

It would be unsatisfactory for the action can be seen merely as an exceptional deviation from international law. It is more in keeping with the reality of the world to see it as an attempted shift of international law to a new position where, in humanitarian crises, the sovereignty of states has to yield to the protection of peoples. Yet whether any such status has been reached is doubtful. It has sometimes been argued that intervention in order to protect the lives of persons situated within a particular state and not necessarily nationals of the intervening state is permissible in strictly defined situations. But it is hard to reconcile this with article 2(4) of the United Nations Charter, unless the meaning of "territorial integrity" is distorted.[57]

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[52]Heather Wilson, International Law and the Use of Force by National Liberation Movements 33 (1988).

[53]Indeed, this is scarcely surprising given that, the words of the Appeals Chamber of the International Tribunal on War Crimes in the former Yugoslavia in the Tadic case, "[t]he conflicts in the former Yugoslavia have both internal and international aspects"; case no. It-94-1-AR 72, p 43.

[54]Heather Wilson, International Law and the Use of Force by National Liberation Movements 52 (1988).

[55]Ove Bring, *Should NATO take the lead in formulating a doctrine on humanitarian intervention*, 3 NATO Review 24, 25 (1999).

[56]Ove Bring, *Should NATO take the lead in formulating a doctrine on humanitarian intervention*, 3 NATO Review 24-25 (1999). There is certainly much evidence for this latter possibility; D.J. Scheffer, *Towards a Modern Doctrine of Humanitarian Intervention*, 23 University of Toledo Law Review 253 (1992).

[57]Malcolm Shaw, International Law (4th ed 1997) 802; J.P. Fonteyne, *The Customary International Law Doctrine of Humanitarian Intervention*, 4 California Western International Law Review 203 (1974); R.B. Lillich, *Intervention to Protect Human Rights*, 15 McGill Law Journal 205 (1969); R.B. Lillich, *Forcible Self-Help by States to Protect Human Rights*, 53 Iowa Law Review 325 (1967).

The point at which repeated practice hardens into a rule of law is uncertain. Higgins has suggested that this is "at the point at which states regard themselves as legally bound by the practice".[58] Since no such perception was present, the police action in Kosovo can at best be described as an exceptional deviation from international law, which might in due course harden into a rule that in humanitarian crises, the sovereignty of states has to yield to the protection of peoples. Given the lack of uninimity even within NATO, the action cannot be seen as an attempt to shift of international law to this new position.

X Conclusion

Traditionally the laws of war were concerned with the regulation of warfare between states.[59] Since the nineteenth century there has been significant growth in the laws of humanity, or human rights.[60] It has been said that these two strands have joined.[61] The law of armed conflict is only one group of principles guiding the nations in times of conflict.[62] It is now generally recognised that the law of armed conflict applies in all international armed conflicts, regardless of their legality.[63] They have now been extended to the modern phenomenon known as wars of national liberation.[64]

The NATO attacks on Yugoslavia in 1999 make it clear that the law of armed conflict applies in all international armed conflicts, including not merely wars of national liberation,[65] but also police actions by the international community to the laws of humanity, or human rights.[66]

Wars of secession may well replace the anti-colonial wars of the 1950s, 1960s and 1970s as the national liberation struggles of the twenty-first century. So far, the United Nations and the regional organisations (especially the OAU) have been extremely reluctant to apply the right to self-determination to secessionist struggles. Current events, however, may

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[58]Dame Rosalyn Higgins, The Development of International Law through the Political Organ of the United Nations 6 (1963).

[59]Gretchen Kewley, International Law in Armed Conflicts (1984).

[60]Consideration of human rights obligations have become central to planning military operations; Felicity Rogers, *Australia's Human Rights Obligations and ADF Operations*, 131 Australian Defence Force Journal 41-44 (1998).

[61]Lt-Col Frank Thorogood, rtd, *War Crimes: How Do We Define Them and Punish the Criminals?*, 119 Australian Defence Force Journal 4-16 (1996).

[62]Georg Schwarzenberger, International Law vol 2, *The Law of Armed Conflict* (1968).

[63]This is expressed in Article 2, which is common to all four Geneva Conventions of 1949:

> [The Conventions apply to] all cases of declared war or any other armed conflict which may arise between two or more of the High Contracting Parties, even if the state of war is not recognised by one of them.

[64]Article 1 (4) of Protocol I additional to the Geneva Conventions for the Protection of War Victims, 1949 (1977).

[65]Article 1 (4) of Protocol I additional to the Geneva Conventions for the Protection of War Victims, 1949 (1977).

[66]Consideration of human rights obligations have become central to planning military operations; Felicity Rogers, *Australia's Human Rights Obligations and ADF Operations*, 131 Australian Defence Force Journal 41-44 (1998).

force upon us a serious rethinking of the types of groups that are entitled to self-determination and to the active military protection of the international community.[67]

[67]For but two examples of writers who have seen Yugoslavia as critical to the development of modern humanitarian law and the laws of war, see Major John Hutcheson, *The Genocidal Events in Bosnia-Herzegovna and the International Community's Ability to Deter Future 'Ethnic Cleansing'*, 138 Australian Defence Force Journal 11-18 (1999); P. Akhavan, *Punishing war crimes in the former Yugoslavia: A critical juncture for the New World Order*, 15 Human Rights Quarterly 262-289 (1993).